STATE OF MICHIGAN

COURT OF APPEALS

PAMELA PEREZ, Plaintiff-Appellant,	UNPUBLISHED June 6, 2006
v	No. 249737 Wayne Circuit Court
FORD MOTOR COMPANY and DANIEL P. BENNETT,	LC No. 01-134649-CL
Defendants-Appellees.	ON REMAND

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

In *Perez v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided March 10, 2005 (Docket No. 249737), we reversed the trial court's order granting defendant Ford Motor Company summary disposition, but, on the basis of *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 484-485; 652 NW2d 503 (2002), and *Elezovic v Ford Motor Co*, 259 Mich App 187, 198; 673 NW2d 776 (2003), affirmed the court's grant of summary disposition in favor of Daniel Bennett.[1] After reversing *Elezovic* and overruling *Jager*, our Supreme Court vacated and remanded the instant case for reconsideration in light of *Elezovic v Ford Motor Co*, 472 Mich 408, 431; 697 NW2d 851 (2005). Upon reconsideration, we adopt our prior holding with respect to Ford Motor Company but reverse with respect to Bennett, and remand. To reiterate the previous opinion with respect to Ford:

> Plaintiff began working at the Wixom plant in December 1990, as an hourly employee. She claims that Bennett sexually harassed her for the first time during the summer of 1999, when he offered her money to buy lingerie to model for him. Later, Bennett made a remark about meeting after work. Then, in

[1] Appeals related to this case are *McClements v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No. 243764), aff'd in part, reversed in part, 473 Mich 373; 702 NW2d 166 (2004), amended 474 Mich 1201-1202 (2005), *Maldonado v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No. 243763), lv pending, and *Elezovic v Ford Motor Co*, 259 Mich App 187; 673 NW2d 776 (2004), aff'd in part, rev'd in part 472 Mich 408, 431; 697 NW2d 851 (2004).

August 1999, plaintiff was in Bennett's office. He exposed himself to her and offered her money for a hotel room. Plaintiff did not report these incidents.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Ford brought its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, review under (C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

MCL 37.2202(1) prohibits an employer from discriminating because of sex, which includes sexual harassment. Sexual harassment includes a hostile work environment created by unwelcome sexual conduct or communication. MCL 37.2103(i)(*iii*). To maintain a claim of hostile environment harassment, an employee must prove the following by a preponderance of the evidence:

> "(1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior." [*Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000), quoting *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993).]

Under a hostile work environment claim, an employer can be vicariously liable for sexual harassment of an employee only if it failed to take prompt and adequate remedial action after having been put on notice of the harassment. *Chambers, supra* at 312. The notice can be actual or constructive. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001), citing *McCarthy v State Farm Ins Co*, 170 Mich App 451, 457; 428 NW2d 692 (1988), overruled in part on other grounds *Norris v State Farm Fire & Cas Co*, 229 Mich App 231[; 581 NW2d 746] (1998). The employee gives the employer actual notice if she complains about the harassment to higher management. *Id.* If the employee never complained to higher management, she can prove the employer had constructive notice "by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Id.* If an objective view of the totality of the circumstances

indicates that a reasonable employer would have known there was a substantial probability that sexual harassment was occurring, then notice was adequate. *Chambers, supra* at 319.

Plaintiff admits that by failing to report the incidents, she never gave Ford actual notice of Bennett's harassment.[1] However, she argues that other women's complaints about Bennett gave Ford constructive notice of a hostile work environment at its Wixom plant. Although a complaint of a single coworker may be insufficient to establish notice of a plaintiff's claim of harassment, *Elezovic v Ford Motor Co*, 259 Mich App 187, 196; 673 NW2d 776 (2003), citing *Sheridan, supra* at 627-628, plaintiff provided much more than one complaint. One coworker testified at her deposition that she told a production manager on several occasions that Bennett was sexually harassing her; she also told a superintendent during the time he was temporarily assigned to labor relations, as well as her UAW committeeperson. Defendant admits that the proper procedure for reporting a sexual harassment claim was to report to the labor relations department or a UAW committeeperson.

Moreover, when the coworker reported Bennett's acts toward herself, she also mentioned that Bennett had harassed another employee as well. The superintendent temporarily assigned to labor relations testified that he mentioned the allegations to Bennett who just laughed and drove away; he then reported the allegations to his supervisor in labor relations, who told him not to get involved. Therefore, plaintiff presented evidence that Ford had *actual* notice with respect to two coworkers' claims against Bennett.[1] In addition to plaintiff's allegations and the allegations of her two coworkers, three other women who worked at the plant testified that Bennett either sexually assaulted them or propositioned them for sex between 1997 and 1999. According to the testimony presented, Bennett sexually harassed six different women during this time.

[1.] The two coworkers who complained testified that they were afraid of losing their jobs for mentioning the incidents. Another woman testified that she witnessed an incident with Bennett and one of the coworkers.

Furthermore, with respect to general pervasiveness of sexual harassment, plaintiff and two of the women testified that low-level harassment occurred all the time, but they learned to put up with it because they did not think anyone would

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[1] Plaintiff now claims on remand that she gave Ford actual notice in June 2001, when she testified by deposition in one of the related cases; she did not, however, report the incidents using any of Ford's complaint procedures.

believe them, and those who complained were bullied. This appears to be corroborated by Ezra Carter, the plant's human resources manager from 1995 to 2001, who acknowledged that eight sexual harassment complaints had been filed by women other than those previously mentioned, against seven different men other than Bennett. He stated that in seven charges, each investigation resulted in a conclusion that there was no basis to the complaint.[2] In addition, the plant manager during the time in question indicated he would need to see corroborating evidence or photographs demonstrating that the allegations were true before taking action, and that Bennett had been sent home with pay to protect Bennett and the plant from further false charges.

[2.] In the remaining charge, the supervisor admitted making the lewd comment and was told not to make such comments in the future; there is no indication he was further disciplined.

The instant case is distinguishable from *Chambers, supra*, and *Sheridan, supra*. First, *Chambers* does not address whether harassment must be against a particular plaintiff to be considered constructive notice. *Sheridan* is a bit more instructive. In *Sheridan*, the plaintiff, a custodian, alleged that a fellow custodian had repeatedly sexually harassed her at the school where they both worked. She did not tell anyone about the harassment until after the fourth incident. *Id.* at 624, 627. Then, less than a month after she first complained, the school district conducted an investigation and fired the alleged harasser. *Id.* at 613. In refusing to hold the district vicariously liable, this Court held that a prior incident of harassment five years earlier was not so pervasive that the district should have known that the defendant was also harassing plaintiff. *Id* at 627-628. That ruling implies that where harassment is not so remote in time and is more pervasive, the harassment of a fellow employee might be sufficient to impute constructive knowledge to an employer.

After considering this evidence in the light most favorable to the nonmoving party, we conclude that a material factual dispute exists whether Ford should have known that a hostile work environment existed at the Wixom plant. In *Maldonado v Ford Motor Co*, unpublished opinion per curiam of the court of Appeals, decided April 22, 2004 (Docket No. 243763), [lv pending 471 Mich 940 (2004),] slip op at 9, this Court recently held that evidence of other acts of harassment was highly probative whether Ford should have known that Bennett was sexually harassing the plaintiff in that case. This Court stated that the testimony of other employees helped show the "totality of the circumstances" known to Ford. *Id.* Therefore, granting Ford summary disposition was improper.

After reviewing our Supreme Court's decision in *Elezovic, supra*, we find no reason to change our previous opinion with respect to Ford's liability. Citing *Radtke, supra*, at 382-383, the Court repeated the elements an employee must meet to maintain a case of sexual harassment

based on a hostile work environment. *Elezovic, supra* at 412 n 4. We address each of these elements in turn while keeping in mind that we review the evidence in a light most favorable to the nonmoving party. First, it is undisputed that plaintiff, as a woman, belonged to a protected group. Second, while an employee of Ford, plaintiff was subjected to conduct or communication on the basis of sex when Bennett offered her money to buy and model lingerie, and when Bennett exposed his penis to her and offered her money. Third, there was no indication from the record that plaintiff invited or in any way welcomed this type of attention from Bennett. In fact, she testified that she rebuffed Bennett's advances and walked away when he exposed himself. With respect to the fourth element, there can be little doubt that an offensive work environment is created by a person exposing his penis, masturbating, and offering someone money to take care of him. Hence, the only element left to establish is respondeat superior. *Elezovic, supra.*

Ford essentially argues the Supreme Court in *Elezovic* found that whether Ford knew or reasonably should have known of the harassment could only be established under the totality of the circumstances as they specifically related to the plaintiff. We disagree. Citing *Chambers, supra,* the Court stated the standard for constructive notice,

> "notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." [*Elezovic, supra* at 426, quoting *Chambers, supra* at 319.]

This does not, as Ford suggests, limit the totality of the circumstances to those specifically related to harassment of plaintiff. While it is true the Supreme Court did not consider Bennett's harassment of other women or Ford's investigation of other harassment complaints in *Elezovic,* the Court's review appeared to be limited by the plaintiff's arguments on appeal. *Id.* at 427. We find enlightening the Court's analysis of the admissibility of the circumstances surrounding Bennett's indecent exposure conviction, which occurred off-site. The Court found that off-site behavior involving nonemployees was insufficient to notify Ford that the plaintiff's work environment was sexually hostile. *Id.* at 430. In doing so, it noted that context was important; other types of improper behavior occurring "at entirely different locales and under different circumstances" were irrelevant. *Id.*

> [A]n employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile *[work] environment* . . . ." [*Id.*, quoting *Chambers, supra* at 315-316 (emphasis in *Elezovic, supra*).]

Thus, we find that the general work environment is the key, not the specific acts directed toward plaintiff. Here, the evidence viewed in a light most favorable to plaintiff established that (a) low-level harassment occurred all the time (b) those who complained were bullied, and (c) a complaint was considered meritless unless the actor acknowledged the harassment or the complainant could corroborate the claim. Indeed, the situation was such that Bennett apparently felt comfortable assaulting or propositioning six separate women for sex, and he laughed when confronted by another male employee about his behavior. Moreover, Ford failed to take prompt and adequate action when the supervisor in labor relations told the male employee not to get involved, and Ford sent Bennett home with pay to protect itself and Bennett from "further false

charges." Therefore, we find that plaintiff presented sufficient evidence of respondeat superior to withstand a motion for summary disposition.

With respect to Bennett's individual liability, the Supreme Court found that an agent of an employer can be held individually liable for sexual harassment of an employee in the workplace. *Elezovic*, *supra* at 426. As we previously noted, plaintiff presented sufficient evidence of the first four elements to maintain a case of sexual harassment based on a hostile work environment. Hence, given the Supreme Court's holding with respect to individual liability, we reverse the trial court's grant of summary disposition to Bennett.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Donald S. Owens